United States Court of Appeals

for the Second Circuit

SUPPLEMENTAL APPENDIX

77-1045

B
P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1045

UNITED STATES OF AMERICA,
Appellee,

—v.—

LOUIS CIRILLO,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

SUPPLEMENTAL APPENDIX

IANNUZZI and IANNUZZI
Attorneys for Appellant
233 Broadway
New York, N. Y. 10007
(212) BA 7-9595

UNITED STATES COURT OF APPEALS
FILED
MAR 23 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

PAGINATION AS IN ORIGINAL COPY

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S-1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

Respondent-Plaintiff,

-against-

AFFIDAVIT

LOUIS CIRILLO,

Petitioner-Defendant.

----------x

ALBERT J. KRIEGER, ESQ., being duly sworn, deposes and says:

I am an Attorney at Law admitted to practice law in the Federal District Court, Southern District of New York, and elsewhere, maintaining an office for the practice of my profession at 401 Broadway, County and State of New York.

I was the attorney for the Petitioner-Defendant, above indicated, during his trial on a 2 count indictment charging the Petitioner under 21 U.S.C.812,841,846,963 with possession of heroin with intent to sell, and a conspiracy so to do. I am fully familiar with all of the facts and circumstances herein mentioned, and make this affidavit both to clarify certain ambiguities which appear in Petitioner's sentencing minutes, dated May 25, 1972, which minutes are attached to this application as Exhibit A, and to support the within application to modify the sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure.

BEST COPY AVAILABLE

On April 17, 1972, Petitioner's trial commenced before this Honorable Court and a jury. On April 25th, 1972, the jury found the Petitioner guilty as charged.

Although the penalties detailed by the statutes above indicated provide for a term of imprisonment of not more than 15 years and a fine of not more than $25,000, or both (18 U.S.C. 841), this Court, based upon a representation of the then United States Attorney and his statement in which the said United States Attorney alleged that a Second Offender Information was properly and timely filed against the Petitioner, pursuant to 21 U.S.C.851, adjudged that the Petitioner be committed to a term of imprisonment for a period of 25 years on each of counts one (1) and two (2), to run concurrently with each other, together with the term of special parole for a period of ten (10) years, to commence upon the expiration of confinement.

I am aware that on the day of sentence, immediately preceding the pronouncement of sentence, there was a statement on the record, made by the United States Attorney, Whitney North Seymour, Jr., to the effect that a Second Offender Information, was actually filed on April 12, 1972, thus preceding the trial, as required by 21 U.S.C. 851, although the Docket Sheet in the clerk's office of this court indicated that the said Information was un-timely filed on April 21, 1972, a date well after the commencement of the trial. At the sentencing, the United States Attorney asked this court to

direct that the official docket sheets be corrected to show what the United States Attorney purported to be the proper filing date, to wit, April 12, 1972 (p.2, sentencing minutes).

At that time, Your Honor inquired whether or not the United States Attorney served a copy upon defense counsel. The United States Attorney indicated that he had. And, I, as defense counsel, indicated on the record "Your Honor, I received a copy some time ago." (p.3,sentencing minutes).

When, on May 25, 1972, I indicated to this Court that I had received a copy of the Second Offender Information "some time ago", I, in no fashion whatever, acknowledged or affirmed that the United States Attorney had, in fact, timely or properly filed the purported Information or had, in fact, complied with the statutorily required proceedings to establish prior convictions. Nor did I intend to, nor did I attempt to waive any such requirements or waive any rights of the Petitioner.

I could not then, and cannot now, indicate to this Court that the Second Offender Information was, in fact, filed with the Court prior to April 21, 1972. My only information relating to such filing is that information contained in the official records of the Clerks Office in this Court - which records all indicate and agree that Second Offender Information papers were filed on April 21st, 1972 and not on April 12th, 1972 as alleged by

the United States Attorney. Based upon the classic presumption of regularity, I must now suggest to this Court that the said Information was not timely or properly filed in this Court.

I am now aware that not only did the Docket Sheet of this Court indicate that the Information was un-timely filed on April 21st, 1972, but the clerk's filing stamp on the actual Information itself, as well as all other documents in the Clerk's Office, indicate the Information was un-timely filed on April 21st, 1972.

Moreover, I cannot even affirm, nor do I have any actual knowledge of whether or not the United States Attorney actually served by mail the purported Second Offender Information prior to the 17th of April, 1972, the day on which trial commenced. After searching the records in my office, my diaries for those dates, and my memory, I can and do indicate unequivocally that I have no diaried, dated, or authenticated record indicating that the Second Offender Information was received in my office at any time prior to the 17th of April, 1972.

My comments in Court, on May 25, 1972, that I had received a copy of the Second Offender Information "some time ago" were correct. I had received the Information some time before May 25, 1972. However, I cannot represent to this Court that I was served before the 21st day of April, 1972. I do not know when the Information was served upon me.

Naturally, regardless of the date of service of the Second Offender Information, such service upon me by the United States Attorney neither hindered, delayed, deterred, or excused the filing with the Court requirements for a Second Offender Information.

WHEREFORE, I pray the application be granted in ever respect, together with

Albert J. Krieger, Esq.

Sworn to before me this
1st day of September 1976.

LOUIS E. RIOS
Notary Public, State of New York
No. 03-0583330, Qual. in Bronx Co.
Certificate filed in New York County
Commission Expires March 30, 19__

S-6

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA

-against- 72 CR 309

LOUIS CIRILLO,

Defendant.

- - - - - - - - - - - - - - - - - X

MOTION FOR REHEARING

Comes now the defendant, Louis Cirillo, proceeding pro se, only for the purpose of this motion, upon all the papers and proceedings heretofore had herein, and upon his duly annexed affidavit petitions this Court for a rehearing and reargument of his motion made to vacate his sentence upon the ground of non-compliance with the Statute which was denied by the Court on January 19, 1977.

The ground for this motion as more clearly set forth in the attached affidavit is that retained counsel in the pleading at bar failed to attach an affidavit that was submitted to him by trial counsel Albert J. Krieger and he also failed to subpoena him to offer his testimony as directed by defendant.

WHEREFORE, it is respectfully requested that this motion be granted and for such other and further relief the Court may deem just and proper.

Dated: January 24, 1977

Respectfully submitted,

Louis Cirillo

S-7

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA

72 CR 309

-against-

LOUIS CIRILLO,

AFFIDAVIT

Defendant.

- - - - - - - - - - - - - - - - - X

STATE OF GEORGIA)
) ss
COUNTY OF FULTON)

Louis Cirillo, being duly sworn, deposes and says:

1. I am the defendant herein and make this affidavit in support of my attached motion for reconsideration and reargument of a motion previously made by retained counsel to vacate my sentence upon the ground of non-compliance with the [redacted] directed by the Court.

2. That on January 22, 1977, I became in receipt of the Court's opinion wherein the Court indicated that the failure to obtain an affidavit from Albert J. Krieger or to offer his testimony upon the hearing, or to explain the failure to produce his testimony was of great significance.

3. Prior to the motion being filed to vacate my sentence by retained counsel, he was in receipt of an affidavit of Albert J. Krieger with instructions from me to file same with his moving papers and to also subpoena Mr Krieger if a hearing was granted.

4. That I also requested of my retained counsel to have me subpoenaed for the hearing in order that I may testify that I was never informed by Mr. Krieger that he knows in receipt of the Second Offender Information notice prior to trial and that I never authorized Mr. Krieger to waive away my rights with respect to the Government or the Court complying with any statutorily required proceedings to establish my prior convictions.

5. Prior to the motion being filed, I caused to be sent to my attorney a motion that was prepared for me by another inmate which I assumed he would adopt or make use of the information therein. See Exhibit #1.

6. That in the Offer of Proof of Exhibit #1, page 4, (4), it can be readily seen that it was my intention to offer the affidavit of Mr. Krieger and had I been present at the hearing, I would have insisted that he be subpoenaed to give testimony which the Court felt would have been of great significance which I agree.

7. A matter of great significance that counsel failed to bring to the attention of the Court to support my contention that the Second Offender Information was untimely filed is reflected in the offer of proof in Exhibit #1, page 3, (3), shows that while the affidavit of mailing the Second Offender Information to my trial attorney has the date of April 10, 1972 on it, the stamp of the Court shows the filing date to be April 21, 1972.

8. Another matter that counsel failed to bring to the attention of the Court is also pointed out in Exhibit #1, offer of proof, last page, (8), wherein it shows that an Order of the Court was filed April 21, 1972, to transport me to a doctor to under go medical diagnostic procedures and the stamp of the Court with the filing date of April 21, 1972 is on it which gives rise that the Second Offender Information was filed at the same time.

9. This Court has stressed great reliance upon the fact that my attorney failed to justify the charge that the United States Attorney purposely and intentionally mis-advised the Court about the filing of the Second Offender Information and after having read the transcript of the hearing, I would agree that he failed to sustain that burden but this alone should not be the basis in denying the motion especially when the ambiguities in the official record and the testimony elicited at the hearing from both my witnesses and the government witnesses tend to leave reasonable doubt that the Second Offender Information was indeed filed untimely. While it is unfortunate that counsel chose to attack the United States Attorney on weak circumstantial evidence instead of invoking the presumption of regularity is beyond me and all it did was to divert the thrust of the hearing from the main issue.

WHEREFORE, it is respectfully requested that my motion for rehearing and reargument be granted.

SWORN TO BEFORE ME THIS
24th day of January, 1977

Parole Officer [redacted] the Act of July 7, 1955 to Administer Oaths (18 U.S.C. 4004).

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CERTIFICATE OF SERVICE

Louis Girillo, hereby CERTIFIES that he mailed the original of the attached documents to the Honorable Edward Weinfeld, United States District Court, Southern District of New York, Foley Square, New York, New York, a true copy to Richard Levitas, Assistant United States Attorney, Southern District of New York, and a true copy to John Nicholas Iannuzzi, Broadway, New York, New York, on the date indicated below.

Dated: January 24, 1977

[redacted]

S-11

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - -X

UNITED STATES OF AMERICA

v

72 - CR.- 309

LOUIS CIRILLO, a/k/a

Louis Schiotis, and Louie,

Defendant.

- - - - - - - - - - - - - - - - - -X

MOTION FOR MODIFICATION
AND/OR CORRECTION OF
SENTENCE UPON THE GROUND
OF NON-COMPLIANCE WITH
THE STATUTE

The defendant, Louis Cirillo, through his undersigned attorney, and all of the proceedings heretofore had herein, his attached offer of proof, his affidavit, argument and memorandum of law respectfully moves the Court for an order vacating the sentence previously imposed upon him and modify or correct the sentence pursuant to Rule 35, Federal Rules of Criminal Procedure, upon the ground of non-compliance with the statute as more fully described herein.

That after trial and prior to sentencing in the above captioned cause, the defendant appeared before the Honorable Edward Weinfeld on May 25, 1972, at which time the United States Attorney, Mr Whitney North Seymour handed the Court a copy of an Information that he represented to have been filed on April 12th, 1972, instead of the date of April 21, 1972, as

recorded in the Criminal Docket sheet of the Court. Mr Seymour proffered that there was a clerical error in the Docket sheet and moved the Court for a nunc pro tunc order to change the date of filing the Information from April 21, 1972 to April 12th, 1972.

No opposition being made by defendants counsel and counsel acknowledging that he had received a copy of the information some time ago, the Court arraigned the defendant with respect to the Information.

The Information was then read to the defendant which disclosed a prior conviction on the 17th day of October, 1945 and another on March 5th 1945. After questioning by the Court with respect to the two prior convictions, the defendant admitted his identity and the admission of identity was entered into the record. The Court then went on to sentence defendant on the basis of the Second offender Information to a term of 25 years on counts one and two, to run concurrently with each other and further imposed a special Parole for a period of Ten (10) years to commence upon expiration of confinement.

The chronology of facts leading up to the sentencing of defendant as a Second offender are as follows:

(a) The Indictment against defendant was handed down against him on March 17th, 1972;

(b) Various pre-trial motions were filed prior to April 17th, 1972;

(c) On April 10, 1972, the notice of the Second offender Information was allegedly mailed to counsel of the defendant;

(d) On April 17th, 1972, the trial began and on April 25th, 1972, the defendant was found guilty;

(e) That on April 21st, 1972, an entry was made in the official Criminal Docket showing the filing of the Second Information of offender against defendant;

(f) That on May 25th, 1972, the day of sentencing, the United States Attorney represented to the Court that there was a clerical error in the filing of the Information in that it was filed on April 12th, 1972 instead of April 21st, 1972 as recorded in the official docket entry; Without oposition from defendants counsel, the Court granted the United States Attorney's motion for a nunc pro tunc order changing the filing date of the Information from April 21st, 1972 to April 12, 1972, which in effect made the filing of the Second offender Information timely.

(g) That on May 25th, 1972, defendant was sentenced as a second offender.

It is quite obvious from the facts that the filing of the Second offender Information was un-timely. To buttress defendants claim of the untimely filing of the Information against him, his offer of proof, EXHIBIT "C" conclusively shows that the Clerks filing stamp on the face of the Information contains the date of April 21st, 1972, and not April 12th, 1972, as proffered to the Court by the United States Attorney when he successfuly moved the Court to change the date inorder there could be a timely filing.

Further support in the untimelessness of the Second offender Information is the stamp of the Court in EXHIBIT "D" of the offer of proof which shows the date of April 21st, 1972 as being the filing date. The date of April 21st, 1972 on EXHIBITS "C and D" of the offer of proof corresponds with the exact date the Information was filed in the Official Criminal Docket. See EXHIBIT "A" of the attached offer of proof.

While defendant is not alleging impropriety at this time on behalf of the United States Attorney in his proffer to the Court to change the filing date of the Second offender Information, the ambiguities in the sentencing minutes and the EXHIBITS attached to the offer of proof gives suspicion that someone deliberately caused a fraud upon the Court to change the date of the filing in order that defendant could be sentenced as a Second offender.

W H E R E F O R E , for the foregoing reasons, and after oral argument, it is respectfully requested that the sentence imposed upon defendant in this case be set aside and that he be re-sentenced as a first offender and for such other and further relief the Court may deem proper and just.

Dated:

Respectfully submitted,

_____

S-15

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA

v

72 - CR - 309

LOUIS CIRILLO, a/k/a
Louis Schiotis, and Louie

Defendant.

A F F I D A V I T

- - - - - - - - - - - - - - - - - - X

STATE OF GEORGIA)
COUNTY OF FULTON) ss

Louis Cirillo, being duly sworn, deposes and says:

1. I am the defendant herein and make this affidavit in support of my annexed motion for correction of sentence pursuant to Rule 35, Federal Rules of Criminal Procedure.

2. That prior to trial in the above captioned matter, I was never informed by my retained counsel, Mr Albert J. Krieger, that he was in receipt of a Second Offender Information that was allegedly mailed to him by the United States Attorney's office from the Southern District of New York.

3. After receiving a transcript of the sentencing minutes, Exhibit "B", attached to the offer of proof, I am now aware that the United States Attorney, Mr Whitney North Seymour Jr, handed to the Court a copy of an Information purportedly filed on April 12th, 1972, when in fact it was filed on April 21, 1972.

4. I became aware of the correct filing after a careful examination of EXHIBITS "A, B, C," attached to the offer of proof, and other documentments pertaining to my case.

5. The results of my investigation and examination conclusively show that the Docket sheet of this Court indicates that the Information was un-timely filed on April 21, 1972, and the Clerks filing stamp on the actual Information itself, also contains the date of April 21, 1972.

6. That I never authorized my attorney to waive away my rights with respect to the government or the Court complying with any statutorily required proceedings to establish my prior convictions.

Sworn to before me this _____
day of November, 1976

_____

LOUIS CIRILLO

_____

Caseworker

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - -X

UNITED STATES OF AMERICA

v

72 - CR - 309

LOUIS CIRILLO, a/k/a
Louis Schiotis, and Louie,

Defendant.

- - - - - - - - - - - - - - - - - -X

OFFER OF PROOF

The defendant, Louis Cirillo, through his undersigned attorney submits this offer of proof in support of his annexed motion for correction of sentence upon the ground that the government failed to comply with the Statute.

The first offer of proof marked Exhibit"A" is a certified copy of the Criminal Docket entries of the above captioned cause. Page 2 of the official record shows the Second Offender Information was filed on April 21, 1972. Directly below the entry for Cirillo and on the same date are two other entries which have been marked out and a careful reading shows the names of Victor Panica and Albert Pierro as having Second Offender Informations filed against them but directly opposite their names it is marked "error"

SUPPORT:

1. The official certified record conclusively shows the Second Information of offender filed against Cirillo was on April 21, 1972.

SUPPORT: cont.

2. When the error was discovered of two other names having been marked as Second Offenders and included in the same Docket Entry, their names were marked out and the error noted. However, there is no indication of any errow whatsoever marked along side the name of Cirillo.

(2) The next offer of proof and marked EXHIBIT "B" is an official certified copy of the sentencing minutes wherein Mr Whitney North Seymour, Jr., United States Attorney for the Southern District of New York was successful in convincing the Court that the Second Information of offender was inadvertently filed indicating that the official docket entry reflected the date of filing to be April 21, 1972 instead of April 12, 1972. Mr Seymour also represented to the Court that April 12th was the actual date of filing the Second Offender information and that a copy was served on counsel at that time. Based upon them represenations, the Court arraigned Cirello with respect to the information.

SUPPORT:

1. EXHIBIT "A" shows that the Second Offender Information was filed on April 21, 1972;

2. EXHIBIT "A" does not reflect any entry whatsoever made on April 12, 1972, the date indicated by Mr Seymour that should have been shown for the filing of the Information.

3. EXHIBIT "C", the Information filed by Mr Seymour has the Stamp of the Court in the upper right hand corner indicating the date of filing to be April 21, 1972.

4. The filing date of April 21, 1972, indicated on the stamp of the Court in EXHIBIT "C" conforms to the date of the official docket entry in EXHIBIT "A" that shows the filing of the Second offender Information.

5. Upon information and belief, the Information handed to the Court by Mr Seymour at the time of sentencing which is reflected in EXHIBIT "B" did not have any stamp of the Court whatsoever on it as displayed in EXHIBIT "C".

6. The erroenous representation made to the Court by Mr Seymour that a copy of the Information was served on April 12th to Cirillo's counsel is contradicted in EXHIBITS "B, D, and E". Mr Krieger's comment to the Court with respect to EXHIBIT"B" in reply to receiving a copy of the Information was" Your Honor, I received a copy some time ago", and not on April 12th as represented to the Court by Mr Seymour. EXHIBIT " D" which is a copy of the affidavit of mailing by Dean C. Roluer, an employee of the United States Attorney's office shows that the Information was mailed out to Mr Krieger on April 10th, 1972. Page 4 of Mr Kriegers affidavit, EXHIBIT "E", shows that he has no record that would indicate when he received the Second offender Information.

(3) The affidavit of mailing, EXHIBIT "D" is another offer of proof that the Information was filed with the Court on April 21st, 1972, instead of the date of April 12th thus supporting Cirillo's contention that it was not timely or properly filed in this Court.

SUPPORT: cont.(3)

1. The Stamp of the Court on this Exhibit shows the filing to be April 21, 1972.

2. While the affidavit of mailing shows the date to be the 10th of April, 1972, and while defendant is not alleging any impropriety at this time insofar as the signature of the employee of the United States Attorney's office which was verified by a Notary Public on the same date, it is unusual for the stamp of the Court to appear on that document (EXHIBIT "D") with the filing date of April 21st, 1972, unless the Information was mailed as indicated and untimely filed on April 21st, 1972.

3. The stamp of the Court in this Exhibit which reflects the date of April 21st, 1972 also conforms with the Court stamp on EXHIBIT "C".

(4) The affidavit of Albert J. Krieger, EXHIBIT "E", the then attorney for defendant Cirillo is a further offer of proof that he did not in any manner whatsoever waive away the statutory requirements of filing the Information to establish Cirillo's prior convictions nor did he waive away any of his rights. The affidavit further establishes that there are ambiguities in the sentencing minutes that do not conform to the official documents of record. Mr Krieger went on in his affidavit to invoke the presumption of regularity and respectfully suggested to the Court that the Information was not timely or properly filed.

SUPPORT:

EXHIBIT "E", Affidavit of Albert J. Krieger.

(5) The following Exhibits;

(f) Indictment filed March 17th, 1972;

(g) Bill of Particulars; filed April 5th, 1972;

(h) Notice of Motion; filed April 18th, 1972

(i) Judgment and Commitment;filed May 25th, 1972

(j) Notice of Motion, filed July 17th, all bear the stamp of the Court indicating the date each one was individually filed.

SUPPORT:

1. Excepting EXHIBIT "J" the above EXHIBITS are all docketed timely and conform to the entries made in EXHIBIT "A". Exhibit "J" does not appear on the docket entry because the last date only shows entries made to December 6, 1972.

(6) EXHIBIT "K" is a copy of the Criminal Docket in 72 Crim.313 which shows the filing of Second Information offender against Victor Panica and Albert Pierro which was docketed April 21st, 1972.

SUPPORT:

1. The docketing of the Second Information of offender that was inadvertently docketed against Victor Panica and Albert Pierro in EXHIBIT "A" which was crossed out and marked "error" along side of each entry clearly shows the dates of APRIL 21, 1972, to be the correct date of filing.

(7) Other offers of proof that show the untimely filing of Court documents in this case is reflected on page 4 of EXHIBIT "A" starting with the entry of 8 -8-72 which shows the filing of the Government's supplemental bill of Particulars which is attached hereto and marked EXHIBIT "L".

The other Docket entries that are alleged to have been untimely docketed and filed on page 3 of EXHIBIT "A" are as follows:

8-8-72, Filed Govt's memorandum of law - Preliminary statement

8-8-72, Filed defets. request to charge

8-8-72, Filed defts. supplemental request to charge

8-8-72, Filed Govt's request to charge

8-23-72, Filed Commitment

SUPPORT:

1. Exhibit "L", the Supplemental Bill of Particulars filed in the Court on August 8, 1972, was a modification Bill of Particulars made by the government which bears the date of April 17, 1972 and allegedly was served on Cirillo's counsel prior to trial, but yet, was not filed in the Docket entries or with the Court until August 8, 1972.

2. As it can be readily seen, the above documents filed in the docket and dated 8-18-72 are all pre-trial documents excepting the last one which reflects the commitment of defendant. These documents, while they may have been served as the dates may indicate on each one of them were filed with the Court untimely and recorded in the Criminal Docket, EXHIBIT "A", untimely.

(8) The last offer of proof that is submitted is an entry on page 2 of EXHIBIT "A" which shows that an Order was filed on April 21, 1972, to the United States Marshal to transport defendant to a doctor to undergo medical diagnostic procedures. This date of April 21st, 1972 also appears on the stamp of the Court which indicates when the document was filed.

W H E R E F O R E , for the foregoing proof, it is respectfully requested that the annexed motion be granted.

Respectfully submitted,

_____

S-23

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - -X

UNITED STATES OF AMERICA

v

72 - CR - 309

LOUIS CIRILLO, a/k/a

Louis Schiotis, and Louie,

Defendant.

- - - - - - - - - - - - - - - - - - -X

MEMORANDUM IN SUPPORT OF ATTACHED MOTION FOR MODIFICATION AND/OR CORRECTION OF SENTENCE UPON THE GROUND OF NON-COMPLIANCE WITH THE STATUTE

This memorandum is made in support of defendants motion for modification and/or correction of sentence upon the ground that the government's procedural error in failing to timely file an Information stating the previous convictions to be relied upon for enhanced punishment which was prejudicial to the defendant under the circumstances.

The attached motion is governed by Rule 35 of the Federal Rules of Criminal Procedure which permits the Court to correct an illegal sentence at any time.

On of the most important matters that the Court will have to consider and rely on is the official records and Criminal Docket which are controlled by Rule 55, Federal Rules of Criminal Procedure and Rule 79, Title 28, Federal Rules Civil Procedure.

The text of Rule 55, Federal Rules of Criminal Procedure is as follows:

> The clerk of the district court and each United States commissioner shal keep such records in criminal proceedings as the Director of the Administrative Office of the United States Courts, with the approval of the Judicial Conference of the United States, may prescribe. Amoung the records required to be kept by the clerk shall be a book known as the "criminal docket" in which, among other things shall be entered each order or judgment of the court. The entry of an order or judgment shall show the date the entry is made.

Rule 79 F.R.Civ.P. Title 28 U.S.C.A, specifically states:

> All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be entered chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number...(emphasis added).

Surely no less requirements could be inferred for the record keeping in a Criminal Proceeding. This Court should take judicial notice of the varience of the dates given when the United States Attorney proffered that there was a clerical error in the Criminal Docket sheet which gives proof that the Information was untimely filed. In FLETCHER v UNITED STATES, c/a Va. 174 F. 2d 373, (1949); Cert. denied 70 S.Ct 82; the Court held that the judge may take cognizance of the records of his own Court.

In the instant case, the defendant was found guilty by a jury of violating Title 21, U.S.Code, Sections 812, 841(a)(1) and 841(b)(1)(a); Title 18, U.S.C. Section 2) and conspiracy to importand to distribute and possess with intent to distribute Schedule 1 and 2 narcotic drug controlled substances,(Title 21, U.S.Code, Sections 846 and 963.)

S-25

On May 25, 1972, this Court sentenced the defendant to confinement for a period of 25 years with a Special Parole of Ten(10) years, to commence upon expiration of confinement. The defendant was sentenced pursuant to the provisions of 21 U.S.C. 841 (b) (1), which provides enhanced penalities for second and subsequent convictions of the narcotic laws. The maximum sentence which can be imposed under the enhancement provisions of that Statute is a term of 30 years.

The defendants motion and the argument herein alleges that the sentence imposed is illegal and improper under the law, in that the government failed to file an Information which complied with the requirements of 21 U.S.C. § 851(a); and therefore requires re-sentencing.

The defendant in this case is not claiming that the convictions relied upon in the Second offender Information that was handed to the Court were invalid, nor did he dispute the fact that he was the person convicted, but is claiming that there was not strict compliance with the procedures outlined in the Statute.

While some Courts have held that the failure to file an information in strict compliance with the procedure outlined in Title 26 U.S.C., § 7237 (c)(2) was harmless error when the late filing did not result in prejudice to the defendant, KNIGHT v UNITED STATES, 225 F.2d 55 (9th Cir), UNITED STATES v DUHART, 269 F.2d 113, 116,(2d Cir. 1959) ; the Court in UNITED STATES v NOLAND, 495 F. 2d 529 (1974)(Fifth Cir.), thought otherwise and remanded the case for reduction of sentence upon the ground that the government failed to strickly comply with the Statute.

S-26

In NOLAND, supra, the Court of Appeals for the Fifth Circuit in conducting a review of the legislative history of the Comprehensive Drug Abuse Control Act of 1970, found that Congress intended 21 U.S.C. § 851(a) to be interpreted differently than 26 U.S.C. § 7237(c)(2). Section 851 opens with the provision that

> No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States Attorney files an information with the Court(and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon....(emphasis added)

In granting this discretion to the prosecution, Congress imposed a strict condition on its exercise. Section 851 is clearly phrased in mandatory language. The words "(n)o person . . . shall be sentenced to increased punishment . . . unless . . ." restrict the court's authority to impose enhanced sentences to cases where the information is filed with the Court and served on the defendant before trial.

In the NOLAND case, supra, the Information was not filed until one day after sentencing and the Court held it clearly did not comply with the language of the present controlling act.

The Court of Appeals for the Fifth Circuit in UNITED STATES v GARCIA, No. 74 - 4126 (Feb.6,1976), vacated the sentence and remanded the case for resentencing upon the ground that the Court did not comply

with the provisions of Title 21 U.S.C. § 851 (b). This section of the Statute has to do with the Court inquiring of the defendant after conviction but before the pronouncement of sentence with respect to the Information filed as to whether or not he affirms or denies that he had been previously convicted as alleged in the Information.

In an unreported opinion handed down by the Honorable Murray Gurfein, in the matter of UNITED STATES v ALEX METRO, 71-CR-302, dated October 8,1976, United States District Court, Southern District of New York, and while the decision was adverse to the defendant due to the savings clause of Public Law No. 91-513, in that the repeal did not affect the Second Offender procedure applicable for violations of 173 and 174 of Title 21, the judge indicated in his opinion that the filing of the Second offender Information would have had to been timely filed and he quoted the language contained in 851(a) of Title 21.

W H E R E F O R E , for the foregoing reasons and the law pertaining to the timely filing of the Information, the attached motion is should be granted and the defendant resentenced according to law.

Dated:

Respectfully submitted,

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Rec'd 3/7/77

Mr. Rothenberg

U.S. Attorney's Office

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